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FEDERAL COMMUNICATIONS COMMISSION
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December 21, 1998

VIA COURIER

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Satellite Delivery of Broadcast Network
Signals Under the Satellite Home Viewer Act
CS Docket No. 98-201; RM No. 9335; RM No. 9345**

Dear Ms. Salas:

Submitted herewith, on behalf of Pegasus Communications Corporation, are the original and eight copies of its Reply Comments in the captioned rulemaking.

If there are any questions regarding this matter, please contact the undersigned.

Sincerely,


Ted S. Lodge

cc: Don Fowler (w/diskette)
International Transcription Service, Inc. (w/diskette)
Enclosure

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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)

Satellite Delivery of Broadcast)
Network Signals Under the Satellite)
Home Viewer Act)
_____)

CS Docket No. 98-201
RM No. 9335
RM No. 9345

REPLY COMMENTS

Pegasus Communications Corporation ("Pegasus") hereby files its reply comments in the above-referenced proceeding. In its initial comments, Pegasus supported the proposition in the Notice of Proposed Rulemaking ("Notice") that the Commission develop a methodology for the prediction and measurement of a "signal of Grade B intensity" for purposes of the Satellite Home Viewer Act ("SHVA"). Additionally, Pegasus suggested a standard to be adopted. As set forth below, nothing in the comments filed by other parties refute the proposals made by Pegasus.

Background

In its comments, Pegasus demonstrated that the Commission has full authority to develop a definition of a "signal of Grade B intensity" for purposes of SHVA. Arguments to the contrary contained in some of the other comments filed in this proceeding are simply not persuasive. As set forth in greater detail in the following pages, despite the protestations to the contrary, the Commission has been authorized by Congress to provide a definition of a "signal of Grade B

intensity” that accurately reflects which households can receive an acceptable over-the-air signal and which may lawfully receive distant network signals by satellite.

In its Comments, Pegasus went on to advocate a predictive standard for Grade B intensity that is easy to administer, and that places the DBS operator on a level playing field with its principal competition -- the cable system. Pegasus remains firm in its conviction that the Commission should create a 35-mile “red zone” that reflects the scope of exclusivity enforceable under the typical network affiliation agreement pursuant to the network non-duplication rules applicable to cable systems. Pegasus also proposes creation of a “yellow zone”, where the DBS company can provide distant network signals if no over-the-air Grade B signal is available. Pegasus’ position is flexible as to the predictive model and individual household measurement standards selected by the Commission for use in that zone, provided that such standards are inexpensive and easy to use, reflect today’s marketplace realities, and use the best available technology to accurately predict the over-the-air reception available at a given home. These matters are discussed in more detail below.

Argument

A. The Commission Has The Authority to Define "A Signal of Grade B Intensity"

Various parties (most of whom represent broadcasting interests) argue that the Commission does not have the authority to take most of the steps described in the Notice, although some open the regulatory door a crack by stating that the Commission could, after an exhaustive inquiry, alter the definition of Grade B intensity “for the many regulatory purposes for which it uses the concept, if it concluded that a better objective proxy for acceptable picture quality was available.” NAB Comments at 26. *See also* Television Network Affiliate

Associations Comments at 73-76 (adopt the model used in the Prime Star/Netlink agreement); *compare* Small Cable Business Association (“SCBA”) Comments at 3-7 (the Commission lacks authority altogether).^{1/}

Those who argue that the Commission has either slim authority or none at all start from premises with which Pegasus agrees. For example, the SHVA established an objective standard and was designed to benefit households located in rural areas. *See, e.g.*, NAB Comments at 9-15. SHVA was also designed to protect localism. *See, e.g.*, NAB Comments at 17-18; Pappas Telecasting Comments at 8-10.

However, opponents of the Commission’s authority then proceed to conveniently sweep under the table the Commission’s general authority to promote the public interest and to stimulate competition in the multichannel video marketplace, goals mentioned throughout the SHVA’s legislative history^{2/} and in the Commission’s legislative charter. Instead, these opponents of FCC authority clothe their arguments in various points, all of which fail analysis.

First, the opponents argue that because the SHVA is part of the Copyright Act, and the FCC is a creature of the Communications Act, the twain shall never meet. NAB Comments at 29; Television Network Affiliate Associations Comments at 2-4; Disney Company Comments at 7-8. This argument ignores plain statutory language, legislative history and the realities of technological convergence. To paraphrase the Copyright Office, the restriction is a

^{1/} It is instructive to note that the SCBA, among all the commenting parties, takes the most restrictive view of the Commission’s authority. SCBA’s comments are not surprising. The cable television industry is the beneficiary of the status quo, and the lack of competition caused by current confusion which drives consumers from satellite delivered signals to cable.

^{2/} *See, e.g.*, H. Rep. No. 100-887, pt. 1, 100th Congress. 2d Sess. At 28 (1998): “Another of the principal purposes of the legislation is to establish a level playing field between the cable television and earth station industries.”

“communications provision” placed by happenstance in the Copyright Act.^{3/} If Congress had intended the Commission not to have any authority, section 119(c)(10) would not have used the words “as defined by the Federal Communications Commission.” If this argument held water, the Commission would not have jurisdiction over various elements of the cable compulsory license. *See* 17 U.S.C. § 111(d)-(f).^{4/ 5/}

Second, they contend that the SHVA explicitly grants the Commission regulatory authority in four other areas: (1) a study and rulemaking (within 120 days) regarding the feasibility of imposing syndicated exclusivity rules for private home viewing; (2) a cross-reference to the syndicated exclusivity issue; (3) a study (within one year) on price discrimination against distributors of secondary transmissions from satellite carriers; and (4) initiation of an inquiry (within six months) concerning the need for universal encryption standards. NAB Comments at 31-32. In contrast, according to opponents of this proposed rulemaking, the reference to the Commission’s authority to define “signal of Grade B intensity” does not explicitly or implicitly require the Commission to act, and therefore cannot be read to confer the Commission with authority to act. The four above-mentioned areas of statutory authority are readily distinguishable

^{3/} Copyright Office Report at 99.

^{4/} Some proponents of this argument find that the Commission has no authority over copyright issues only when it suits their purposes. For instance, the Network Affiliate Associations Comments contend that the FCC has no authority over the question of Grade B intensity because the concept is contained in the Copyright Act and not the Communications Act. Yet these same comments advocate that the FCC punish satellite operators who violate the Copyright Act by revoking their FCC licenses. Either the FCC has authority over copyright issues or it does not. These parties cannot have it both ways.

^{5/} The FCC has always had some involvement in copyright matters. The initial adoption of rules concerning cable must carry and program exclusivity rights was done with the intent of influencing copyright legislation. *Cable Television Report and Order*, 36 FCC 2d 143, 165-167 (1972). To argue that the FCC has no role in copyright issues would be to ignore this long history of interplay between the communications and copyright laws.

because they all involve Commission studies or inquiries which must be completed within certain specified time periods. The mere fact that the Congress did not delineate a time limit within which the Commission was to exercise its regulatory authority pursuant to section 119(c)(10)(A) does not permit the giant leap of faith that the Commission lacks all authority. Otherwise, there could never be a delegation to any regulatory agency without timing strings attached. This is plainly nonsense.

Third, several parties attempt – somewhat half-heartedly – to distinguish the seminal administrative law doctrine of deferral to agency decision-making enunciated by the Supreme Court in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). *See, e. g.*, NAB Comments at 33; Disney Company Comments at 10. Their first contention, that *Chevron* applies only to an agency’s interpretation of a statute that it administers, is not persuasive because the provision of the statute in question (section 119(c)(10)(A)) is entrusted to the Commission for its administration. The second contention, that “an agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear” (*see MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994)), is premature and applicable only insofar as the Commission departs from the express language and underlying policy of the SHVA. Pegasus, in its initial comments, requests the Commission to remain within the parameters of the SHVA, and cannot imagine that the Commission would stray beyond such parameters.

In *Chevron* cases, it has become commonplace to consult the dictionary to assess the meaning of a regulatory assignment. *See id.* The statutory word “defined” has a dictionary meaning: “clearly outlined, characterized, or delimited.” Webster’s Third New International Dictionary at 592 (1986). Congress generally confers definitional authority on an agency when it

asks the agency to assess and update particular rules or terms relative to regulatory or technological conditions within the agency's expertise. *See* DirecTV Comments at 9-15. Should the Commission decide to define a "signal of grade B intensity"^{6/} for purposes of the SHVA, or to establish a new definition, and explain its reasons for doing so consistent with the Administrative Procedure Act, the *Chevron* doctrine entrusts the Commission with administrative power that will predictably be given a wide berth by the courts. *See Babbitt v. Sweet Home Chapter of Communities for A Great Oregon*, 515 U.S. 687, 708 (1995).

One of the shortest, but most important, comments filed with the Commission was that of Senator Patrick Leahy. Senator Leahy's simple message is unassailable: "No customer [of] 'distant' satellite TV signals should be cut off if the customer is unable to receive local TV broadcasts over-the-air." Leahy Comments at 1. Senator Leahy also lays to rest the notion that Congress did not craft the SHVA with competition in mind: "Let me make clear that it should be an important goal of the FCC to promote competition." *Id.* at 3.

Understandably, the statements of the Senator are post-enactment in nature. However, due to the fact that Senator Leahy was the chief Senate sponsor and floor manager of the 1988 SHVA and floor manager of the 1994 SHVA amendments, his thoughts are worth far more than passing credence. Moreover, his comments reflect what he already stated pre-enactment during Senate floor debate:

It is my purpose to encourage increased accessibility for viewers, greater variety of programming for them, continuing development of alternative technologies, and to create competitive situations, such as between cable and satellite, to better serve the public.

140 Cong. Rec. S14,104-0 (daily ed. Oct. 4, 1994).

^{6/} As set forth in Pegasus' initial comments, the term "a signal of Grade B intensity" has never been defined by the Commission, nor does its rules relating to the Grade B contour really deal with the measurement of signal intensity at a particular point.

Various parties argue that because the SHVA is scheduled for a legislative “sunset” on December 31, 1999, the Commission “need not rush in with a band aid, when the main operation shortly will begin in Congress.” ALTV Comments at 7; *see also* WB Television Network Comments at 6-7. Some even raise the specter of litigation against a Commission action in this proceeding. ALTV Comments at 7. These comments are nothing more than pleas for delay in the exercise of the Commission’s authority based on forecasts of future actions which may or may not ever come to pass.

If the Commission has specific authority to act under the SHVA, and as it has general authority to serve the public interest and promote competition in the multichannel video marketplace, it logically follows that the Commission could take regulatory steps to fulfill the express promise of the SHVA; that is, to ensure that households that are not able to receive acceptable over-the-air network signals are able to receive network programming from another source. In this regard, the Commission clearly can adopt a predictive model for determining whether signals can be received at individual households, as well as an inexpensive method for testing the strength of a signal at the individual household level.

B. The Predictive Model Advocated By Pegasus Should Be Adopted

The comments filed by the parties range far and wide to find an acceptable standard to be used in evaluating whether a home receives a “signal of Grade B intensity” as provided by the SHVA. Numerous variations on Longley-Rice are proposed. *Compare*, NAB Comments at p. 38 (urging acceptance of standard Longley-Rice model); Prime Star Partners, L.P. Comments at pp. 4, 7 (requesting that the Commission modify Longley-Rice and adopt a 90% confidence variability factor); and Prime Star 24 Joint Venture Comments at pp. 19-20 (supporting a 95% confidence level). New models, not previously employed by the Commission, such as TIREM, are suggested

by others. *See, e.g.* Satellite Broadcasting and Communications Association Comments. Various technical proposals are advanced in other filings. *See, e.g.* Electronic Technicians Association, International, Inc. Comments at p. 18 (USSB/CEMA mapping project suggested as methodology); Decision Mark Corp. Comments (suggesting use of its database for predictive purposes). About the only proposition that enjoys widespread support is that the standard adopted be easy to use and administer.

None of the proposals have the ease of application for the bulk of households as that advanced by Pegasus. Under the Pegasus proposal, where satellite companies would have a "red zone" for the provision of distant signals to homes within 35 miles of a station, many of the most contentious issues would be immediately eliminated. *See, e.g.*, Television Network Affiliate Association Comments at 12 (96% of Prime Time 24's offending households were within the Grade A contour of the station). In fact, the comments filed by the Warner Brothers Network advocate the application of network non-duplication and syndicated exclusivity to satellite operators, but do not take the next logical step advocated by Pegasus, e.g. the adoption of a "red zone" in which network exclusivity rights would prevail over the interests of the satellite companies.

Beyond the 35 mile zone, the need for a predictive methodology still exists. Here, many promising solutions have been advanced which should be carefully reviewed by the Commission. In its initial comments, Pegasus suggested that either a modified Longley-Rice test be used, or a new methodology, such as TIREM, be adopted to provide an accurate predictive model of where homes can actually receive a Grade B signal. Any such methodology must take into account the actual reception received in the home, using a realistically mounted antenna, taking into account interference received from other stations.

The safety valve methodology of actual measurements will also continue to be necessary, as it is mandated by the SHVA. Again, the Commission's methodology for measurements of the location of the Grade B contour are not adequate substitutes for the measurement of "a signal of Grade B intensity" at a particular house. A standard, easy to use, inexpensive methodology for measuring signal intensity must be adopted by the Commission. Pegasus has proposed an industry standards committee be established to develop the methodology, and the comments appear to support the need for such a committee. Only by working together can the satellite and television industry bridge the unnecessary divisions which have grown up between them, divisions which have been so clearly reflected in some of the comments filed in this proceeding.

Conclusion

Pegasus proposes a middle road -- one which guarantees to the broadcaster network exclusivity in the households which comprise the core of its market, while allowing satellite providers to provide distant signals to the homes which truly cannot receive an acceptable local service. Pegasus proposes that its suggestions be adopted.

Respectfully submitted,

PEGASUS COMMUNICATIONS
CORPORATION



Ted S. Lodge
Senior Vice President, Chief Administrative